FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 12 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 468

THE ATLAS BUILDING PRODUCTS COMPANY,
Petitioner,

v.

DIAMOND BLOCK & GRAVEL COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEE C. BLYTHE,
P. O. Box 829,
Clovis, New Mexico.

R. C. GARLAND,
JAMES T. MARTIN, JR.,
P. O. Box 269,
Las Cruces, New Mexico.

Attorneys for Respondent.

SUBJECT INDEX

	Page
Statement of the case	1
Argument	4
I	
There is no irreconcilable conflict with decisions of the Seventh and Ninth Circuits on the question of whether, in a price discrimination suit between competing sellers, the sales must have been made to competing purchasers, and the point is unnecessary to disposition of this case	4
II	
"Reasonable possibility" is the correct measure of the effects proscribed by § 2(a) of the amended Clayton Act under the decisions of this Court, and the Circuits are in agreement	12
III	
Pinpoint accuracy in tracing damages to acts complained of is not required, and there is no conflict on this point	14
IV	
This case creates no conflict with other Circuits on computation of damages	18
V	
Section 2(a) of the amended Clayton Act is not so vague, uncertain and indefinite as to be unconstitutional	19
Conclusion	21

Table of Authorities Cited

Cases

	Page
American Can Co. v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951)	14
Anheuser-Busch v. *FTC*, 265 F.2d 677 (7th Cir. 1959), pet. for cert. filed Sept. 9, 1959, Dkt. No. 389	4, 6, 7, 11
Arden, Elizabeth, Inc. v. *FTC*, 156 F.2d 132 (2nd Cir. 1945), cert. den. 331 U.S. 806, 67 S.Ct. 1189	20
Arden, Elizabeth, Sales Corp. v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945), cert. den. 326 U.S. 773, 66 S.Ct. 231	20
Balian Ice Cream Co. v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991, 75 S.Ct. 545	4, 12
Baush Machine Tool Co. v. *Aluminum Co. of America*, 79 F.2d 217 (2nd Cir. 1935)	18
Biddle Purchasing Co. v. *FTC*, 96 F.2d 687 (2nd Cir. 1938), cert. den. 305 U.S. 634, 59 S.Ct. 101	20
Bigelow v. *R.K.O. Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574	18, 19
Corn Products Refining Co. v. *FTC*, 324 U.S. 726, 65 S.Ct. 961	12, 13
Eastman Kodak Co. v. *Southern Photo Co.*, 273 U.S. 359, 47 S.Ct. 400	19
Edelmann, E., & Co. v. *FTC*, 239 F.2d 152 (7th Cir. 1956)	12
Emich Motors Corp. v. *General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), rev'd 340 U.S. 558, 71 S.Ct. 408 (1951)	18
Enterprise Industries v. *Texas Co.*, 240 F.2d 457 (2nd Cir. 1957), cert. den. 353 U.S. 965, 77 S.Ct. 1049	18
F. & A. Ice Cream Co. v. *Arden Farms Co.*, 98 F.Supp. 180 (D.C.S.D.Cal.,C.D., 1951)	21
Fargo Glass & Paint Co. v. *Globe American Corp.*, 201 F.2d 534 (7th Cir. 1953)	19
Flintkote Co. v. *Lysfjord*, 246 F.2d 368 (9th Cir. 1957), cert. den. 355 U.S. 835, 78 S. Ct. 54	15

	Page
FTC v. *Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822	12
Great Atlantic & Pacific Tea Co. v. *FTC*, 106 F.2d 667 (3rd Cir. 1939), cert. den. 308 U.S. 625, 60 S.Ct. 380	20
Minneapolis-Honeywell Reg. Co. v. *FTC*, 191 F.2d 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206, 73 S. Ct. 245	12, 13
Momand v. *Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948), cert. den. 336 U.S. 967, 69 S.Ct. 939	14
Moog Industries, Inc. v. *FTC*, 238 F.2d 43 (8th Cir. 1956), affirmed, 355 U.S. 411, 78 S.Ct. 377	12
Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115, 75 S.Ct. 148	10, 11, 21
Mos , Samuel H., Inc. v. *FTC*, 148 F.2d. 378 (2nd Cir. 1945), cert. den. 326 U.S. 734, 66 S.Ct. 44	13
Nash v. *United States*, 229 U.S. 373, 33 S.Ct. 780	20
National Lead Co. v. *FTC*, 227 F.2d 825 (7th Cir. 1955), rev'd 352 U.S. 419, 77 S.Ct. 502	13
Oliver Bros. v. *FTC*, 102 F.2d 763 (4th Cir. 1939)	20
Porto Rican American Tobacco Co. v. *American Tobacco Co.*, 30 F.2d 893 (2nd Cir. 1929)	10
Safeway Stores v. *Vance*, 355 U.S. 389, 78 S.Ct. 358	21
Standard Motor Products, Inc. v. *F.T.C.*, 265 F. 2d 674(2nd Cir. 1959)	13
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248	16, 19
U.S. v. *Bowman Dairy Co.*, 89 F. Supp. 112 (D.C. N.D.Ill. 1949)	21
United Shoe Machinery Co. v. *United States*, 258 U.S. 451, 42 S.Ct. 363	20
Webb-Crawford Co. v. *FTC*, 109 F.2d 268 (5th Cir. 1940), cert. den. 310 U.S. 638, 60 S.Ct. 1080	20
Whitaker Cable Corporation v. *FTC*, 239 F.2d 253 (7th Cir. 1956)	12
Wolfe v. *National Lead Company*, 225 F.2d 427 (9th Cir. 1955), cert. den. 350 U.S. 915, 76 S.Ct. 135	19

Constitution and Statutes

	Page
Fifth Amendment, United States Constitution	21
Clayton Act, § 2, 38 Stat. 730	19
Clayton Act, as amended §§ 2(a), 2(c), 2(e), 49 Stat. 1526, 15 U.S.C.A. §§ 13(a), 13(c), 13(e)	12, 20, 21
Clayton Act, §§ 3, 4, 38 Stat. 731, 15 U.S.C.A. §§ 14, 15	20
Robinson-Patman Act, § 3, 49 Stat. 1528, 15 U.S.C.A. § 13a	20

Miscellaneous

CCH Trade Reg. Reports, ¶ 3601.35	13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 468

THE ATLAS BUILDING PRODUCTS COMPANY,
Petitioner,

v.

DIAMOND BLOCK & GRAVEL COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Throughout its Statement (Pet. pp. 4-9), petitioner The Atlas Building Products Co. (hereinafter usually called Atlas) has omitted or distorted important facts necessarily found against it by the jury under the trial court's instructions. To chase down and scotch each misstatement would be like trying to gather wind-scattered feathers and put them back in a pillow, and would take much more space than the original statements. We will confine ourselves to the more important, referring the Court respectfully to the Tenth Circuit's statement of the facts as

being fair and impartial. It should be noted that Atlas has not attacked the facts as stated by the Tenth Circuit in any particular.

Atlas fails to mention that during the period involved in this action (January 1, 1958-August 8, 1957) it sold $603,163.10 worth of cinder concrete building blocks in Dona Ana County, New Mexico, at prices which were prima facie discriminatory (less than 24.6¢ or El Paso price plus transportation), and these sales amounted to four-fifths of its business in that county. (R. 374). Atlas would gloss over this by talking (Pet. p. 6) about the $160,000 worth of block it sold there at non-discriminatory prices, mainly on jobs which it knew the respondent, Diamond Block & Gravel Co, (hereinafter usually called Diamond), could not handle. Atlas seems oblivious to the fact that it thereby admits discriminating among its customers in Dona Ana County! Atlas also likes to talk about prices exacted at retail by its dealers *vis a vis* Diamond's retail prices, and about prices of the parties in 1950 and 1951 before the period involved in this suit, all of which is irrelevant.

Atlas fails to mention that it had over 99% of the block business in El Paso County, Texas, where its plant was located and where it had only one tiny "competitor" who manufactured a different type of block (R. 667, 668, 35, 42-44), and that its sales manager admitted its prices there might be lower if it had to compete (R. 668).

Atlas fails to mention that in El Paso, where it thus had a virtual monopoly, its uniform price to all dealers was 21.6¢ f.o.b. plant or 23.1¢ delivered, that it exacted the same prices from more than 50 contractors there while favoring three with lower prices (R. 618, 671, 687), and that at the same time it was selling block to the large dealers and contractors in Las Cruces, 45 miles away and where

it had competition, at 17¢ f.o.b. plant or 20¢ delivered. Atlas fails to mention that it took the two largest home builders away from Diamond with this 20¢ price (R. 473-478, 542, 543). Although Atlas never pleaded or attempted to prove that it cut prices to meet Diamond's, it claims that Diamond offered the 20¢ price first. Diamond did for a short time attempt to meet *Atlas'* 20¢ price, but did not cut first (R. 153, 155, 156, 490, 504).

Atlas pleaded and attempted to prove that it cut to 20¢ to meet the price of an Albuquerque manufacturer who sold two truckloads of *pumice* block in Las Cruces early in 1952 and went out of business in 1953, while Atlas continued this price until the time of trial and extended it to other customers. There is some doubt that the Albuquerque competitor's price was 20¢, but in any event the jury's verdict disposed of this defense and necessarily decided the fact against Atlas. (R. 474, 488, 489, 545, 659, 660)

Atlas would convey the impression that the El Paso and Las Cruces market areas are entirely separate. The fact is that they are adjacent and overlapping, with both dealers and contractors operating to some extent across the artificial demarcation line. (R. 730, 732, 667). In fact, Atlas contended at the trial that El Paso and Las Cruces constituted *one market area* (R. 81, 83, 84).

Diamond objects to Atlas' statement that Diamond could not have taken care of additional business. The uncontroverted evidence shows that it could easily have expanded its production and would have done so but for Atlas' price warfare, which took away the steady, house-a-day, "bread and butter" business which would have made such expansion feasible. (R. 70, 120, 152-156, 194, 195, 494).

Atlas claims it never sold below cost in Las Cruces. Sales below cost are not a necessary element of such a case,

but there was some evidence from which the jury could have decided this question, too, against petitioner. (R. 64, 104-108) Atlas complains that Diamond's cost figures were not accurate, but it had no cost accounting system itself (R. 681) and its own data contained only a guess as to the overhead and sales costs (R. 769). Diamond did produce reasonably accurate cost data which did not certain non-recurring items which would not enter into calculating lost profits (R. 148, 149).

ARGUMENT

I

There Is No Irreconcilable Conflict with Decisions of the Seventh and Ninth Circuits on the Question of Whether, in a Price Discrimination Suit Between Competing Sellers, the Sales Must Have Been Made to Competing Purchasers, and the Point Is Unnecessary to Disposition of This Case

Atlas contends that the opinion of the Tenth Circuit in this case is in direct conflict with *Anheuser-Busch* v. *FTC*, 265 F.2d 677 (7th Cir. 1959), petition for certiorari filed September 9, 1959, Dkt. No. 389, and *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991, 76 S.Ct. 545, 100 L.Ed. 856 (1956), with regard to whether "the charging of different prices in different areas in sales to non-competing purchasers constitute[s] price discrimination," as Atlas states the issue (Pet. p. 10).

It is true that the Tenth Circuit disagreed with *Anheuser-Busch* and distinguished *Balian* on the facts, but both can be so distinguished and do not involve a point which is necessary to the determination of this case.

The Tenth Circuit's statement regarding these two cases is short enough to be set forth in full:

"Our case is also, we think, distinguishable on facts from Balian Ice Cream Co. v. Arden Farms Co., 9 Cir., 231 F.2d 356, in which, while the interstate manufacturer discriminated in price between different purchasers in distant localities, the difference in the price was held not to substantially lessen competition or tend to create a monopoly in the product sold. In short, the conclusive finding of the trial court negated the existence of any prohibited consequences or the possibility thereof.

The same legal issue was before the Seventh Circuit in Anheuser-Busch, Inc. v. Federal Trade Commission, 265 F.2d 677, where the court was presented with the basic question whether uniform local price cuts by an interstate manufacturer which disrupted the market to the injury of local competitors, were price discriminations within the proscription of Section 2(a). The court held that even though directed at local competitors, the price cuts were not discriminatory, apparently because they did not discriminate among local competitors. This conclusion is apparently based upon the theory contended for here that the statutory words 'different purchasers' means competing purchasers. We respectfully reject any such restriction upon Section 2(a). For, we are convinced that geographic price discriminations employed for predatory ends are cognizable under either Section 2(a) or Section 3, and it was therefore not error for the court to tell the jury that they might consider differences in price in El Paso County, Texas, and Dona Ana County, New Mexico, in determining whether the defendant was

guilty of actionable price discrimination." 269 F.2d at 955.

Although we must admire the Tenth Circuit's candor in disagreeing with *Anheuser-Busch*, the cases are so different on the facts and legal issues involved that the courts will have no difficulty in distinguishing them.

Atlas would have this Court believe that the only basis for Diamond's case is the discrimination in prices exacted from Las Cruces, New Mexico, customers as compared to those exacted from its customers in El Paso, Texas. Atlas also discriminated among its customers in Las Cruces. This is implicit in the Tenth Circuit's statement:

> "There was evidence that during the prosecution period, the appellant sold $162,000 worth of blocks in the Las Cruces area for prices in excess of 24.1¢, but the evidence also showed without much dispute that during the same period, it sold $603,163 worth of blocks at prices lower than 24.1¢ in the same area. From this it is reasonable to say, as did the jury, that the appellant discriminated in prices between its purchasers in El Paso and its purchasers of the same class in the Las Cruces area." 269 F.2d at 956.

The Tenth Circuit's attention was focused primarily on discrimination across the state line, but the Record shows that Atlas favored certain contractors and dealers in Las Cruces against their local competitors (R. 596-623, 627, 695-697). It also shows that, unlike *Anheuser-Busch* and *Balian*, this case involved adjacent and somewhat overlapping market areas. Atlas' general manager admitted (R. 730) that some El Paso dealers sold block in Las Cruces, for instance, and he conceded that to that extent

they were in competition with Las Cruces dealers. Also, some El Paso contractors bought Atlas block in El Paso for delivery in Las Cruces, where they were in direct competition with local contractors (R. 732).

Las Cruces, in Dona Ana County, New Mexico, is 45 miles from El Paso by U.S. Highways 80-85. Counsel for Atlas asked the Witness Van Alsburg the following questions, which elicited the answers shown:

> Q. And there is no question but that Otero County and Dona Ana County [both in New Mexico] are in the El Paso Market area?
>
> A. They are in the radius that has been sold to El Paso, which we call the marketing area.
>
> Q. And from your norms which you are talking about, they certainly fall into a norm for a marketing area, isn't that correct?
>
> A. That is correct. (R. 81)
>
> . . . . . .
>
> Q. So your estimate, you now tell us, is not based on the Las Cruces area, it is based on the Las Cruces plus the El Paso area; is that it?
>
> A. I set them separate, but they overlap. (R. 83).

No comparable situation existed in either *Anheuser-Busch* or *Balian*. In both of those cases the prices complained of were at least uniform within the market area involved, and there was no overlapping of market areas.

Anheuser-Busch is not a competing-sellers private suit but an FTC proceeding, wherein the FTC sought to keep Anheuser-Busch from selling beer in the St. Louis market area at prices lower than exacted by it in other, unspecified

market areas throughout the United States. The Seventh Circuit said,

> "There were many separate marketing areas for beer in the country. Each market had a distinct pattern of prices and the prices charged for the same beers varied among the different marketing areas." 265 F. 2d at 680.

In *Balian* the defendant, Arden, had ice cream manufacturing plants located in Los Angeles and Seattle and Balian contended Arden should charge the same prices in both areas, even though the two widely separated areas were served by different plants and the product was not shipped between the two areas. In Los Angeles, Arden had numerous competitors and had to contend with a chaotic pricing situation. Its competitors made so many "chiseling" cuts that Arden could not keep up with them, so Arden made a "blanket" cut in its Los Angeles prices. None of these facts fits the case at bar, where Atlas had only one real competitor (Diamond) in the area involved, admittedly paid no attention to Diamond's prices, supplied both areas (El Paso and Las Cruces) from the same plant, and initiated the price war itself.

In successfully opposing the petition for certiorari in *Balian*, Arden asserted at p. 20 of its brief that "Nowhere in the opinion is there a statement, either by inference or otherwise, that in order to establish price discrimination within the meaning of the Act there must be sales at different prices to purchasers who compete directly with each other," and that it is necessary to take statements out of context in order to arrive at any such conclusion. Atlas likewise has taken two statements out of context (two paragraphs apart) and pieced them together to make

them appear to be what they are not. The resulting patchwork follows:

> "'It is obvious that Arden, by selling ice cream products in the Los Angeles area at a lower price than it charged for like products in other states, did not violate Sec. 2(a) of the Clayton Act, as amended, 15 U.S.C.A. Sec. 13(a). * * * The customers of Arden in the respective areas are not in competition with each other, and the products sold in each area are sold in competition with like products manufactured by others.' 231 F. 2d at pp. 366-367." (Pet. p. 12)

The last sentence quoted, as stated by respondent Arden in its brief at p. 20, ". . . appears in a paragraph relating generally to the Court's findings . . ." In any event, it is a negative sort of statement, and the Ninth Circuit did not state it as a requirement. With Arden's counsel disclaiming any such holding in *Balian* as now urged by Atlas, the conflict contended for here appears unreal indeed.

Atlas also objects, irrelevantly, under this point that "The court below even failed to state whether the uniform price was supposed to be a uniform mill net return or a uniform delivered price." (Pet. p. 13) Since Atlas made no pretense of having a uniform mill net return or a uniform delivered price, no such issue was in the case. Also, having tendered no instructions on this matter and not having objected on these grounds to the instructions given, Atlas is in no position to complain. In any event, it is obvious that Atlas' prices were discriminatory on *any* basis. Its *delivered* price to some Las Cruces customers actually was lower than its *f.o.b. plant* price at El Paso!

Atlas complains that the court below failed to consider the asserted facts (again irrelevant to the point at hand) that Atlas made a "reasonable net profit" on all its Las

Cruces sales, and that Diamond made a profit every year (Pet. p. 13). Petitioner apparently believes that *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 123 (1954) and *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 893 (2nd 1929) hold that to be guilty of price discrimination a seller must sell below cost, must drive its competitor out of business or at least make him lose money, and must have a "predatory" intent in cutting prices. They do not, of course, but we do not feel it necessary to belabor these irrelevant matters under the point of whether there is a conflict in the circuits on the "competing purchasers" question.

However, *Moore* and *Porto Rican* certainly do support the Tenth Circuit's holding that there need not be direct competition between purchasers in a price discrimination suit between competing *sellers*. This matter was briefed and argued by both sides in *Moore* v. *Mead's Fine Bread Co., supra,* without evoking a specific holding on the point, but this Court necessarily considered it in reciting the facts and saying that they "read upon the words of the statute." 348 U.S. at 120, 75 S. Ct. at 150. That case is on all fours with this one. It was a suit between competing sellers, and the price cut was made to retail merchants in Santa Rosa, New Mexico, where the plaintiff had his bakery, while prices were kept high elsewhere, including Farwell, Texas, 114 miles distant. The Santa Rosa merchants were in no way in competition with those in Farwell, but the price to the latter furnished the high-price "leg" of the discrimination. This Court, after setting out the facts and the sections of the statue involved, said:

> "Those sections, on their face, seem to cover the instant case . . .
>
> "We think that the practices in the present case are also included within the scope of the anti-trust laws . . .

"This type of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act. See Porto Rican American Tobacco Co. of Porto Rico v. American Tobacco Co., 2 Cir., 30 F. 2d 234, 237. It seems plain to us that Congress went at least that far in the Robinson-Patman Act. As we have shown, the facts charged and found read upon the words of the statute. And the history of the Act shows it was designed to have the reach now claimed for it by petitioner." *Id.*, 348 U.S. at 118-120, 75 S. Ct. at 150, 151.

In the *Porto Rican* case, likewise between competing sellers, the prices compared for the purpose of establishing the discrimination were made to non-competing purchasers, "those of the United States and of Porto Rico." It is anachronistic that, 30 years after this Second Circuit decision and five years after this Court approved it in *Moore* v. *Mead's Fine Bread Co.*, there still should be any doubt that a seller may maintain an action under such circumstances.

The Tenth Circuit undoubtedly is correct on this matter. Whatever disposition this Court may make of the petition for certiorari now pending in Anheuser-Busch, no useful purpose would be served by granting the petition in this case. The real conflict is between *Anheuser-Busch* and *Moore* v. *Mead's Fine Bread Co., supra.* It is unnecessary to disturb the Tenth Circuit's decision in order to correct the Seventh Circuit's interpretation of the applicable decisions of this Court.

II

"Reasonable Possibility" Is the Correct Measure of the Effects Proscribed by § 2(a) of the Amended Clayton Act Under the Decisions of This Court, and the Circuits Are in Agreement

Atlas contends that the Tenth Circuit erred in approving the trial court's use of the term "reasonable possibility" in instructing the jury as to what constitutes the harmful effect on competition proscribed by § 2(a) of the amended Clayton Act, 15 U.S.C.A. § 13(a), 49 Stat. 1526. Although admitting that this Court has employed the "reasonable possibility" test, Atlas claims it "inadvertently switched" from the "reasonable probability" terminology it formerly used and that four circuits and the Federal Trade Commission have refused to follow this switch.

We deny the existence of any such inadvertence or conflict. The "reasonable possibility" rule laid down in *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320 (1945) was reiterated in *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948) and was emphasized by the dissent in the latter case, thus negativing any inadvertence.

The cases in which Atlas claims to discern a conflict are: *Minneapolis-Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 F.2d 786, 792 (7th Cir. 1951), cert. dismissed, 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952); *Whitaker Cable Corporation* v. *FTC*, 239 F.2d 253 (7th Cir. 1956); *E. Edelmann & Co.* v. *FTC*, 239 F.2d 152, 154 (7th cir. 1956); *Moog Industries, Inc.* v. *FTC*, 238 F.2d 43, 51 (8th Cir. 1956), affirmed, 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed. 2d 370 (1958); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356, 368 (9th Cir. 1955), cert. denied, 350 U.S. 991, 76

S.Ct. 545, 100 L.Ed. 856 (1956); *Standard Motor Products, Inc.* v. *FTC*, 265 F.2d 674, 676 (2nd Cir. 1959).

Atlas then cities the FTC policy statement, CCH Trade Reg. Reports, ¶ 3601.35, which gives a clue to the use of "reasonable probability" in some of the FTC cases. It is clear that the FTC approaches this matter from the point of view of "public interest" rather than that of the individual competitor who may be victimized. There is, of course, nothing to keep the FTC from applying a higher standard of proof of "effect" in its proceedings than the minimum this Court has said is necessary. For the same reason, it confines itself largely to those cases in which there is a greater likelihood of substantial injury to competition generally. Sometimes, as in *Edelmann*, it makes findings of *both* reasonable possibility and reasonable probability of the proscribed effect. The courts in reviewing FTC orders have a tendency to employ the higher standard which the FTC has imposed on itself, but only where they affirm the orders, *e.g.*, *Edelmann*, *Moog Industries*, *Whitaker Cable* and *Standard Motor Products*. In *National Lead Co.* v. *FTC*, 227 F.2d 825, (7th Cir. 1955) rev'd on other grounds, 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed. 2d 438 (1957), not cited by Atlas, the Seventh Circuit made it clear that, although the Commission found a reasonable *probability* to exist, a reasonable *possibility* was all that was required under *Corn Products* and *Morton Salt*. In *Standard Motor Products* the Second Circuit made it equally clear that the facts there afforded more than the "bare minimum prima facie case" held sufficient in *Morton Salt* and *Samuel H. Moss, Inc.* v. *FTC*, 148 F.2d 378 (2nd Cir. 1945), cert. den. 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 438 (1945). *Minneapolis-Honeywell* is in perfect harmony with *Corn Products* and *Morton Salt*, as well as with later

Seventh Circuit cases, for it simply says that a *mere* possibility is not a *reasonable* possibility.

Balian, the only non-FTC case cited by Atlas as supporting a test of "reasonable probability," in effect holds the opposite, saying,

> "The findings of the trial court expressly negativing the existence of any such consequences or a *possibility* of such results were supported by substantial evidence." 231 F.2d at 368 (Emphasis supplied).

Thus no conflict exists in the circuits on this point, and no circuit has contravened the doctrine laid down by this Court. As far as a jury is concerned, the difference between "reasonable posssibility" and "reasonable probability" no doubt is very slight, and it disappears entirely where, as here, the victimized competitor has suffered *actual* damage. Respondent tendered an instruction that such actual effect meets the requirements of the Act (No. 22, R. 837), and it would have obviated any instruction on "reasonable possibility" of effect. Thus even the "reasonable possibility" instruction was more favorable to Atlas than it deserved.

III

Pinpoint Accuracy in Tracing Damages to Acts Complained of Is Not Required, and There Is No Conflict on This Point

As a vehicle to bring up the sufficiency of the facts to sustain the verdict, Atlas again seeks to employ an imaginary conflict in the circuits, contending that the decision here conflicts with *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948), cert. den. 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118 (1949); *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir.

1951); and *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir. 1957), cert. den. 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed. 2d 46 (1957).

These cases, Atlas asserts, hold that "where there are a number of causes for loss and the plaintiff is unable to pinpoint the cause of all or any ascertainable part of his losses as being caused by the defendant's illegal activities, a verdict for plaintiff cannot stand." (Pet. p. 17) None of these cases makes such a sweeping statement. Each can be distinguished readily on the facts, but to do so would take much more time and space than warranted. In any event, petitioner has not made such an analysis.

The facts are well summarized by the court below at 269 F. 2d 955 and 956. Perhaps the most significant of these facts is that about four-fifths of Atlas' sales in Las Cruces were at prices which were discriminatory as compared to its El Paso prices, and lower than Diamond's. With its lower prices Atlas took a number of customers from Diamond, including the two principal home builders in the area. In view of this and other evidence, the trial judge said the jury's $10,000 award was "very moderate," and the Tenth Circuit agreed. 269 F. 2d at 959.

Although Atlas during the trial threw up quite a smoke-screen of other possible causes of Diamond's losses, and though this undoubtedly had a moderating effect on the verdict, there still was plenty of evidence of damages directly traceable to Atlas' acts to support the verdict. The standard defense tactic in such cases is to paint the plaintiff as completely inept, inefficient, and foredoomed to failure. If appellate courts were to upset every jury verdict where there was evidence of this sort, simply on the ground that the plaintiff did not trace his damages to the acts of the defendant with "pinpoint" accuracy, private actions for treble damages under the anti-trust laws would be completely hopeless. They are difficult enough as it is.

This Court has stated the applicable rule in such cases in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 556, 51 S. Ct. 248, 251, 252, 75 L. Ed. 544 (1931):

> "Disposing of the second item of damages, the court below, after referring to evidence tending to show that petitioner was not in a thriving financial condition, said that petitioner was without capital to meet the situation which it faced, even if there had been no conspiracy and there had been open competition; and that its failure was inevitable either from lack of capital or inefficient management or both. The court therefore concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by the respondents. But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact-finding body. Whether the lawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.' Milwaukee, etc., Railway Co. v. Kellogg, 94 U.S. 469, 474, 24 L. Ed. 256. And the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

Atlas also cites *Story Parchment*, quoting a portion of one sentence which might seem to support its position.

It is placed back in context below, with the portion quoted by Atlas italicized:

"Upon a consideration of the evidence, we are of opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination; and that the assumption indulged by the court below, that respondents' acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices, must be rejected as unsound.

"Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. *The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong*, not to those damages, which are definitely attributable to the wrong and only uncertain in respect of their amount." • • •

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation

or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. Eastman Co. v. Southern Photo Co., 273 U.S. 359, 379, 47 S. Ct. 400, 71 L. Ed. 684." 282 U.S. at 562, 51 S. Ct. at 250, 251.

Indeed, in *Bigelow* v. *R.K.O. Pictures, Inc.*, 327 U.S. 251, 264, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946), this Court held that the plaintiff in such a case can recover damages "not shown to be attributable to other causes" than the defendant's wrongful acts. This burden of proof has not been met by Atlas. Extensive quotations could be made from the *Bigelow* and *Eastman Kodak* cases, also, but they will be omitted since *Story Parchment* covers the point so well.

IV

This Case Creates No Conflict with Other Circuits on Computation of Damages

As we understand Atlas' fourth reason for granting certiorari, it is contended that Diamond failed to produce *any* evidence as to the amount of its damages and that in sustaining the judgment of the trial court the Tenth Circuit created a conflict with these decisions: *Baush Machine Tool Co.* v. *Aluminum Company of America*, 79 F.2d 217 (2nd Cir. 1935); *Enterprise Industries* v. *Texas Company*, 240 F. 2d 457, 458-459 (2nd Cir. 1957), cert. denied, 353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914 (1957); *Emich Motors Corp.* v. *General Motors Corp.*, 181 F. 2d 70 (7th

Cir. 1950), reversed on other grounds, 340 U.S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951); *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534, 540-541 (7th Cir. 1953); *Wolfe* v. *National Lead Company*, 225 F. 2d 427 (9th Cir. 1955), cert. denied, 350 U.S. 915, 76 S. Ct. 135, 100 L. Ed. 802 (1955).

Petitioner has not pointed out wherein these cases conflict with the decision of the Tenth Circuit, but they are cited by Atlas for the proposition that "the jury must have figures with which reasonably to compute the amount of damages" (Pet. p. 19) It is difficult to come to grips with such generalities. Apparently Atlas contends that damages in such cases should be capable of exact computation, a concept which this Court has long since laid to rest in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, *Bigelow* v. *R.K.O. Pictures, Inc.*, and *Eastman Kodak Co.* v. *Southern Photo Co.*, discussed under the preceding point.

The bald statement that Diamond failed to produce any evidence as to the amount of damages might be met with an equally flat denial. However, we respectfully refer the Court to the Tenth Circuit's opinion, 269 F. 2d at 958, for a partial summary of such evidence, and also to the objections to petitioner's statement of the facts.

V

Section 2(a) of the Amended Clayton Act Is Not So Vague, Uncertain and Indefinite as to Be Unconstitutional

This is a case of first impression on this point. Never before in all the 45 years since the enactment of the original Clayton Act, nor in the 23 years since its amendment by the Robinson-Patman Act, has anyone had the temerity to attack either the original § 2 or the present § 2(a) on

grounds of unconstitutionality. No doubt others have been deterred by *Nash* v. *United States*, 229 U.S. 373, 33 S. Ct. 780, 57 L. Ed. 1232 (1913), where this Court upheld the much broader Sherman Act against a similar assault.

It is submitted that the Sherman Act is, or was in the beginning, much more vague and uncertain in meaning than the Robinson-Patman Act. In addition, the former carries penal provisions which the latter does not, and the courts apply stricter standards of certainty to criminal or penal statutes. Atlas construes the treble damage feature of the Clayton Act's § 4, 15, U.S.C.A. § 38 Stat. 731, as making it a penal statute, but cites no authority. This is a false premise. *Elizabeth Arden Sales Co.* v. *Gus Blass Co.*, 150 F. 2d 988, 992 (8th Cir. 1945), cert. den. 326 U.S. 773, 66 S. Ct. 231, 90 L. Ed. 467, (1945).

Other sections of the Clayton Act, as amended by the Robinson-Patman Act, have survived constitutional attacks. These include §§ 2(c), 2(e), and 3; 15 U.S.C.A., §§ 13(c), 13(e) and 14. Upholding § 2(c) are *Biddle Purchasing Co.* v. *FTC*, 96 F. 2d 687 (2nd Cir. 1938), cert. den. 305 U.S. 634, 59 S. Ct. 101, 83 L. Ed. 407 (1938); *Oliver Bros.* v. *FTC*, 102 F. 2d 763 (4th Cir. 1939); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667 (3rd Cir. 1939), cert. den. 308 U. S. 625, 60 S. Ct. 380, 84 L. Ed 531 (1940); and *Webb-Crawford Co.*, v. *FTC*, 109 F. 2d 268 (5th Cir. 1940), cert. den. 310 U.S. 638, 60 S. Ct. 1080, 84 L. Ed. 1406 (1940). Section 2(e) was upheld in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, *supra*; and *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132 (2nd Cir. 1946); cert. den. 331 U.S. 806, 67 S. Ct. 1189, 91 L. Ed. 1828 (1947). Section 3 was held valid by this Court in *United Shoe Machinery Co.* v. *United States*, 258 U.S. 451, 42 S. Ct. 363, 66 L. Ed. 708 (1922). Likewise, § 3 of the Robinson-Patman Act, 15 U.S.C.A. § 13a, though not a part of the amended Clayton

Act, has been held constitutional in *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (D.C.S.D. Cal., C.D., 1951). *Cf., U.S. v. Bowman Dairy Co.*, 89 F. Supp. 112 (D.C.N.D. Ill. 1949).

It is submited that § 2(a) is at least as definite and certain as these other sections of the Clayton and Robinson-Patman acts.

It is much too late, of course, to contend seriously that § 2(a) of the amended Clayton Act violates the Fifth Amendment Too many cases have been litigated under it at all levels of the Federal courts. We feel sure that if there were any doubt about it this Court would have raised this jurisdictional question *sua sponte* in such cases as *Moore v. Mead's Fine Bread Co., supra*, and *Safeway Stores v. Vance*, 355 U.S. 389, 78 S. Ct. 358, 2 L. Ed. 2d 352 (1958).

Conclusion

We submit that petitioner has failed to state any special or important reasons why a writ of certiorari should be granted in this case. Accordingly, the petition should be denied.

Respectfully submitted,

DEE C. BLYTHE,
P. O. Box 829,
Clovis, New Mexico.

R. C. GARLAND,
JAMES T. MARTIN, JR.,
P. O. Box 269,
Las Cruces, New Mexico.

Attorneys for Respondent.